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**CASE NO. SC95377**

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**STATE OF MISSOURI *ex rel.*  
HEARTLAND TITLE SERVICES, INC., *f/k/a*  
HEARTLAND TITLE COMPANY, INC., AND JAMES C. DAY,**

**RELATORS**

**vs.**

**THE HONORABLE KEVIN D. HARRELL,**

**RESPONDENT.**

**WRIT OF PROHIBITION IN THE  
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
16<sup>TH</sup> JUDICIAL CIRCUIT**

**The Honorable Kevin D. Harrell, Circuit Judge**

**Case No. 1516-CV04888**

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**BRIEF OF RELATORS**

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## JURISDICTIONAL STATEMENT

This action involves an original proceeding for writ of prohibition filed by Relators in this Court to request the Court to prohibit Respondent from dismissing one of Relators' claims in the circuit court for lack of venue. Dismissal of the claim foreclosed Relators' right to seek redress for injuries in court by removing Relators' ability to file suit for their injuries within the state of Missouri, thereby violating the Open Courts provision of the Missouri Constitution, Mo. Const. Art. 1 § 14. Dismissal was based on an interpretation of Section 508.010, RSMo, which, if correct, would render Section 508.010 unconstitutional because it would violate the Open Courts provision of the Missouri Constitution. Therefore, the action involves a provision of the constitution of this state and the validity of a statute of the state as applied by the lower court, rendering the action subject to the exclusive appellate jurisdiction of this Court under Art. 5 section 3.

In addition, this Court has general superintending control over all courts and tribunals under Mo. Const. Art. 5 section 4.1, and this Court may issue and determine original remedial writs such as this one to prevent a usurpation of judicial power when the trial court lacks jurisdiction. Respondent lacks jurisdiction to dismiss Relators' claim for lack of venue because Section 508.010, RSMo, the statute upon which dismissal for improper venue was based, does not prescribe a specific venue for this case, thereby rendering venue proper in any Missouri county, including in Jackson County where it was filed.

## STATEMENT OF FACTS

Relators filed suit against Defendant attorneys for professional malpractice in connection with Defendants' representation of Relators in an earlier case brought against a woman named Deborah McGuire. (Ex. 1 at ¶¶ 22-24). Respondent dismissed Relators' claim for lack of venue. (Ex. 9) Relators now seek to prohibit Respondent from dismissing the claim.

The claim at issue<sup>1</sup> alleged negligence that occurred in a lawsuit that was filed but dismissed due to Defendants' negligence. (Ex. 1 at ¶¶ 22-24) The Defendants herein failed to respond to motions to dismiss filed in the previous case, which directly caused the previous case to be dismissed and lost. (Ex. 1 at 24) All parties in this action agreed to the following:

- 1) The claim at issue alleges a tort in which Relators were injured outside the state of Missouri in a Kansas bankruptcy case; (Ex. 1 at ¶¶ 15-29, Ex. 2 at ¶¶ 8-12, 15)
- 2) The Relators do not reside in Missouri but instead are an individual with no residence in Missouri and a Florida corporation that formerly was a Kansas corporation; (Ex. 1 at ¶¶ 1, 3, Ex. 2 at ¶¶ 5, 7) and
- 3) The Defendants are an individual whose principal place of residence is not in Missouri and a Kansas corporate entity defendant with no registered

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<sup>1</sup> Relators filed a two-count Petition in the Circuit Court. (Ex. 1) Defendants below did not move to dismiss Count I for lack of venue, and it is not at issue in this action. (Ex. 2)

agent within the state of Missouri. (Ex. 1 at ¶¶ 18-19, Ex. 2 at ¶¶ 1-3)

Defendants moved to dismiss Relators' claim and argued that Jackson County was not an appropriate venue for the claim because Missouri's general venue statute, Section 508.010, RSMo, did not designate Jackson County as a venue in which the claim must be filed. (Ex. 2) As explained more fully below, the parties agree that Section 508.010 does not prescribe any particular venue for the claim because none of the potential venues based on the criteria used to determine venue under the statute (*e.g.*, the county where a plaintiff was first injured, the county where a plaintiff resides, the county where a defendant resides, or the county where a corporate defendant's registered agent is located) were in Missouri. As such, Defendants argued that venue for the claim was not proper in any county in the State of Missouri. (Ex. 2) Defendants below did not argue that the case should be transferred to a different venue or suggest that a different Missouri venue was appropriate for the claim. (Ex. 2) Instead, Defendants argued that the claim should be dismissed because no Missouri venue was appropriate for the claim, according to the criteria used to determine venue under Section 508.010. (Ex. 2)

Relators opposed Defendants' Motion and claimed that venue was proper under Section 508.010, RSMo, and *State ex rel. Neville v. Grate*, 443 S.W.3d 688 (Mo. App. 2014), due to the factual circumstances of the claim. (Ex. 3) Relators argued that, where the venue statute does not mandate a claim be filed in a certain venue, the claim may be filed in any venue. (Ex. 3) Defendants also argued that *State ex rel. Neville v. Grate* conditioned the propriety of venue in Missouri on a nexus or tie to Missouri. (Ex. 4 at pp. 21-22 of the Record on Appeal) Although Relators did not agree with Defendant's

interpretation of *State ex rel. Neville v. Grate*, Relators sought leave to perform discovery to determine whether the case had such a connection, and Respondent denied their request, depriving them of the ability to ascertain whether such a connection existed and provide evidence of it to the court before dismissal. (Ex. 5)

Respondent granted Defendant's Motion and dismissed the claim for improper venue, resulting in this action.<sup>2</sup> (Ex. 9)

### **POINT RELIED ON**

The trial court erred in dismissing Relators' second count for lack of venue because the court did not have jurisdiction to dismiss the claim for lack of venue in that venue was proper in the trial court and in that the trial court's dismissal and rationale for finding that venue was not proper effectively foreclosed Relators' ability to file suit for their injuries within the state of Missouri, thereby violating the Open Courts provision of the Missouri Constitution.

### **ARGUMENT**

The Preliminary Writ of Prohibition should be made permanent in this case to prevent Respondent from acting beyond his power by dismissing a case for improper venue that he lacks power to dismiss because venue was proper.

### **Standard of Review**

A writ is warranted in cases like this where Relators seek to prevent Respondent

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<sup>2</sup> A Petition for a Writ was filed in the Missouri Court of Appeals for the Western District and was denied.

from acting beyond his authority and jurisdiction by dismissing a case for lack of venue.

“The extraordinary remedy of a writ of prohibition is appropriate in one of three instances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy [an] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.”

*State ex rel. Nothum v. Walsh*, 380 S.W.3d 557, 561 (Mo. banc 2012) (quoting *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc 2003)).

A Writ of Prohibition is warranted to prevent the usurpation of judicial power and to remedy an excess of authority or jurisdiction because Respondent lacked authority or jurisdiction to dismiss Relators’ claim for lack of venue as venue for the claim is proper in Jackson County. See *State ex rel. Bank of Am., N.A. v. Kanatzer*, 413 S.W.3d 22, 26 (Mo. App. 2013); see also *State ex rel. Neville v. Grate*, 443 S.W.3d 688 (Mo. App. 2014). As set forth below, pursuant to *State ex rel. Neville*, venue is proper in any county in Missouri in cases like this in which Section 508.010 does not mandate a specific venue. Moreover, Respondent lacked authority to dismiss Relators’ case for improper venue because, when a case is filed in an improper venue, Missouri law requires a court where venue is improper to transfer the case to a proper venue. See Section 476.410; *State v. Taylor*, 238 S.W.3d 145, 150 (Mo. banc 2007) (holding that Section 476.410 “recognizes that the cure for incorrect venue is transfer, not dismissal.”). See also *State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo. banc 2005) (holding that a Motion to

Dismiss for Improper Venue “is not a correct motion.”). When venue is not proper, “[t]he only action to be taken [is] to transfer the case to the appropriate jurisdiction.” *State ex rel. Dillard’s, Inc. v. Ohmer*, 395 S.W.3d 570, 573 (Mo. App. 2006).

## **RESPONDENT’S RULING ON THE MOTION TO DISMISS WAS IN ERROR**

### **Venue Was Proper In Jackson County**

Respondent should have denied Defendants’ Motion to Dismiss Count II for Lack of Venue because venue was proper in Jackson County.

Section 508.010, RSMo, sets forth the criteria for determining venue in Missouri for tort claims like the one at issue. The first criterion, where the plaintiff was first injured, *see* § 508.010.4, is inapplicable because all parties agree that the Relators were first injured in this claim outside of Missouri. (Ex. 1 at ¶¶ 15-29, Ex. 2 at ¶¶ 8-12, 15) Where a plaintiff is injured outside of Missouri, venue is determined by Section 508.010.5, RSMo, which provides as follows:

- (1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation’s registered agent is located or, if the plaintiff’s principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff’s principal place of residence on the date the plaintiff was first injured;
- (2) If the defendant is an individual, then venue shall be in any county of the individual defendant’s principal place of residence in the state of Missouri or, if the plaintiff’s principal place of residence was in the state of

Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.

None of the potential venues in this case (*i.e.*, where Relators resided, where the individual defendant resided, or where the corporate defendant's registered agent was located) are in Missouri. Therefore, Defendants below argued (and Respondent presumably believed<sup>3</sup>) that, because the venue statute did not prescribe a specific venue in Missouri, then no venue in Missouri was proper for the claim.

The Missouri Court of Appeals for the Western District expressly rejected the argument that venue for a claim is not proper in any Missouri court if no venue is prescribed by the criteria set forth in Section 508.010, RSMo, in *State ex rel. Neville v. Grate*, 443 S.W.3d 688 (Mo. App. 2014). Similarly to the instant case, *State ex rel. Neville* was a tort claim that involved out-of-state plaintiffs injured outside the state, an out-of-state individual defendant, and an out-of-state corporate business entity defendant with no registered agent in the state of Missouri. Consequently, the Missouri venue statute did not prescribe a specific county where the claim was required to be brought in that case because none of the potential venues based on the criteria used to determine venue under the statute (*e.g.*, the county where a plaintiff was first injured, the county

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<sup>3</sup> The Order dismissing the case does not set forth reasons for the ruling, so it is not clear why Respondent dismissed the claim. Defendants' argument, however, clearly was based on a contention that venue is not proper for the claim anywhere in Missouri. (Ex. 2)

where a plaintiff resides, the county where a defendant resides, or the county where a corporate defendant's registered agent is located) were in Missouri, just as in the instant case. Thus, there is no specific venue in which cases like this case and the *State ex rel. Neville* case must be brought because Section 508.010 does not provide a venue for them.

The *Neville* Court explicitly held that, by not providing for a specific venue for cases like these, "the legislature did not intend to prescribe a particular venue under the present set of circumstances" and that, "under the facts of this case, venue is proper in *any* Missouri county, including Jackson." *Id.* at 695 (emphasis added). That is, where the venue state does not provide that a claim must be filed in a specific venue, the claim may be filed in *any* venue in Missouri. Thus, venue for this case is proper in any Missouri county because Section 508.010 does not prescribe a specific county in which it must be brought. Therefore, Respondent's dismissal of the claim was in error because venue was proper, so Respondent lacked jurisdiction to dismiss for improper venue.

The *Neville* Court based its ruling on the tenet that venue and jurisdiction are two separate concepts, with "jurisdiction" describing the power of the court to try a case and "venue" relating to the locale where the trial is to be held. *See State ex rel. Kansas City S. Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009). "A court's authority, or jurisdiction, to hear a case is based upon constitutional principles. Venue, in contrast, is determined by the applicable rule or statute. *Venue assumes the existence of jurisdiction* and determines, among many courts with jurisdiction, the appropriate forum for the trial." *Id.* (emphasis added and internal citations omitted). The venue statute does not supersede constitutional concerns, so it cannot eliminate some plaintiffs' abilities to file a suit in

Missouri where jurisdiction is present<sup>4</sup> while leaving it intact for others based on, for example, whether or not a corporate defendant in the case maintains a registered agent for service of process in Missouri, as Defendants' argument below would do. *See State ex rel. Neville*, 443 S.W.3d at 695.

Venue is limiting and restricts where a case may be brought. *See generally HFC Invs., LLC v. Valley View State Bank*, 361 S.W.3d 450, 453 n.2 (Mo. App. 2012) ("Venue assumes the existence of jurisdiction and determines, among many courts with jurisdiction, the appropriate forum for the trial."). If the factual circumstances of a case are not addressed by a venue statute such that the statute does not prescribe a specific venue for the case, then the venue statute is inapplicable, and the case may be brought in any venue where jurisdiction is present because the venue statute has not limited it to a specific venue. Jurisdiction, on the other hand, grants the ability to bring a case in a particular court; if a long-arm or other jurisdictional statute does not grant a plaintiff the ability to bring a case in a particular county because the facts of the case do not fit into the criteria addressed by the statute, jurisdiction does not exist, so the case may not be brought in a court not authorized to hear it by the statute. Respondent dismissed Relators' claim for a lack of venue, **not** jurisdiction. The dismissal was improper because a venue statute's failure to address a particular set of facts makes any venue proper for a case with that set of facts rather than no venue.

As the *Neville* Court expressly acknowledged, the language of Section 508.010,

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<sup>4</sup> Defendants did not challenge jurisdiction in their Motion. (Ex. 2)

RSMo, “does not reflect an intent to deny Missouri venue in all situations not provided for by the statute.” *State ex rel. Neville*, 443 S.W.3d at 693. Thus, there must be a venue in Missouri for a claim in which jurisdiction is proper because “Missouri venue statutes do not affect the jurisdiction of Missouri courts.” *Id.* Respondent’s dismissal, seemingly based on a finding that no Missouri county is an appropriate venue for the claim, is in error.

Defendants below attempted to distinguish the instant case from *State ex rel. Neville* by arguing that the instant case did not have a nexus to Missouri, whereas the underlying claim in *State ex rel. Neville* did. To the extent that Respondent dismissed Relators’ claim because it lacked a nexus to Missouri, the ruling also is in error. The *Neville* Court did not find that venue for the underlying case in *State ex rel. Neville* was proper in Missouri because some of the tortious acts occurred in Bates County, Missouri, thus providing the case with a nexus to Missouri. If it had, it stands to reason that the *Neville* Court would have found that venue would have been appropriate in *Bates County* where those acts creating the nexus occurred, rather than in “*any county*” as the Court held. (emphasis added). Instead, the *Neville* Court based its ruling on the fact that jurisdiction was appropriate in Missouri, but no venue was provided in the statute, so venue was appropriate in any of the many courts with jurisdiction. The *Neville* Court likely only mentioned the connection to Missouri for effect. *See, e.g., id.* at 695 (“Such an arbitrary distinction as to which group of plaintiffs would have access to Missouri courts is certainly unreasonable *especially* given the fact that they would all be asserting the same cause of action for negligent acts committed in Missouri.”) (emphasis added). It

would be odd if the appropriateness of venue hinged on whether a nexus to Missouri was present due to the commission of tortious acts in Missouri considering that the venue statute does not allow for venue in counties where tortious conduct occurs but rather where a plaintiff is injured by them. *See generally* § 508.010, RSMo. Moreover, Section 508.010 clearly allows for venue in cases alleging injuries that occur outside Missouri and, thus, lack a factual nexus to Missouri.

Of course, Relators' claim allegedly has no nexus to Missouri because the corporate entity defendant does not have a registered agent in Missouri. If it did, venue would be proper in the "county where [the] defendant corporation's registered agent is located." § 508.010.5(1), RSMo. If a nexus to Missouri was required to establish venue, then venue would be proper in Missouri for cases involving corporate defendants with registered agents in Missouri, but venue would not be proper for cases where a foreign corporate defendant did not designate a registered agent despite being subject to the state's jurisdiction. Such a rule "would produce an arbitrary and unreasonable procedural bar that would prevent classes of individuals from accessing Missouri courts to assert otherwise viable causes of action for personal injuries." *State ex rel. Neville*, 443 S.W.3d at 695. Moreover, such a result would encourage defendants to avoid venue by disregarding their obligations to designate registered agents within the State of Missouri.

### **Dismissal For Improper Venue Violated**

#### **The Missouri Constitution's Open Courts Provision**

The dismissal of Relators' claim for improper venue effectively has foreclosed Relators from seeking redress for their injuries in Missouri. It is undisputed that

Missouri's venue statute does not provide a specific venue for this case. Thus, if all Missouri venues ruled as the Respondent did—that venue is improper in that particular county because Section 508.010, RSMo does not provide for venue in the county—then Relators would face the same dismissal in every venue in Missouri, and Relators would not be able to seek compensation for their injuries in Missouri.

This cannot be the law because “the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.” Mo. Const. Art. 1 § 14. If Respondent's ruling was the law, Missouri courts would be unavailable to an entire class of litigants for whom Missouri jurisdiction would be met while leaving it intact for others, *i.e.*, those who have designated an agent for service of process. Such an interpretation would violate Missouri's open courts provision because the courts would not be open and no remedy afforded to those for whom the legislature did not see fit to prescribe a particular venue whereas it would be open for others seeking the same redress for the same injuries. Clearly, such an outcome would arbitrarily and unreasonably bar that class of litigants from accessing Missouri courts in order to seek redress for personal injuries, which the open courts provision specifically is designed to prevent. *See Etling v. Westport Heating & Cooling Serv.*, 92 S.W.3d 771, 773 (Mo. banc 2003) (holding that “the open-courts provision was effected to prohibit ‘any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.’”) (quoting *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2009).

The legislature cannot prevent access to Missouri's courts for some while leaving it available for others, and jurisdiction cannot be altered by changes to venue statutes because "Missouri venue statutes do not affect the jurisdiction of Missouri courts." *State ex rel. Neville*, 443 S.W.3d at 693. Allowing Respondent's ruling to stand does both. Respondent's ruling effectively prevents Relators from seeking redress for injuries by effectively holding that no Missouri venue is proper for Relators' claim and, as such, violates Missouri's Open Courts Provision.

### **Dismissal Was Inappropriate Because**

#### **Dismissal Is The Incorrect Remedy For Improper Venue**

Respondent's dismissal was improper and beyond his jurisdiction and authority because dismissal is not authorized where a case has been filed in an improper venue.

Since the enactment of Section 476.410, RSMo, "improper venue is not a jurisdictional defect [and] the remedy for filing in an improper venue is transfer, not dismissal." *Parks v. Rapp*, 907 S.W.2d 286, 292 (Mo. App. 1995) (citing *State ex rel. DePaul Health Center v. Mummert*, 870 S.W.2d 820, 822-23 (Mo. banc 1994)). *See also State ex rel. Bugg v. Roper*, 179 S.W.3d 893, 894 (Mo. banc 2005). Thus, even if Jackson County was an improper venue for the dismissed claim (which Relators specifically deny), then the Respondent's action was still improper because Respondent should have transferred the case to the appropriate venue rather than dismiss it.

The obvious difficulty presented by the need to transfer the dismissed claim to an appropriate venue (if venue was improper) is that it is impossible to determine a specific Missouri venue to which it should be transferred because the facts of this case do not fit

within any of the criteria set forth in the venue statute. The inability to determine the correct venue in order to transfer the case to it proves Relators' point: the venue statute does not mandate that this case be filed in a particular county, so it may be filed in *any* county. Venue assumes that jurisdiction is proper and states which court among many it must be litigated. If a venue statute does not mandate a particular venue for a case, then the case may be filed in any venue in which jurisdiction is proper because the only remedy for a putatively improper venue, transfer to the proper venue under the statute, would be unavailable.

Thus, Respondent lacked jurisdiction to dismiss the claim because Section 476.410 mandates that transfer, not dismissal, is the proper remedy for a case in which venue is not proper.

**If A Nexus To Missouri Is Necessary To Establish Venue, Relators Should Have Been Given The Opportunity To Conduct Discovery To Ascertain If One Exists**

In the event that this Court rules that the reference to the factual connection to Missouri in *State ex rel. Neville* was not dicta used merely for effect, thereby ruling that cases that do not meet any of the prescribed scenarios set forth in Missouri's venue statute require a connection to Missouri for venue, the lower Court still exceeded its authority. Relators sought leave to perform discovery to determine whether the case had such a connection, and Respondent denied their request, depriving them of the ability to ascertain whether such a connection existed before dismissal. (Ex. 5) *See* Rule 51.045(b) (allowing for discovery in determining venue issues).

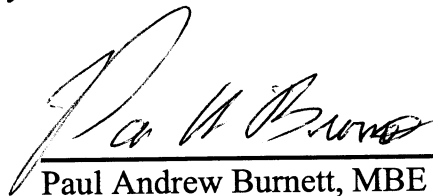
Thus, Relators should have been given the opportunity to discover and

demonstrate a nexus between the claim and Missouri before dismissal, if such a nexus was required.

### CONCLUSION

WHEREFORE, Relators pray that this Court make its Preliminary Writ of Prohibition permanent and prohibit Respondent from dismissing Relators' claim for lack of venue by holding that Jackson County is a proper venue for the claim because Section 508.010, RSMo, does not require it to be filed in any particular county, so it may be filed in any Missouri county. Alternately, if a nexus to the state of Missouri is required to establish venue, Relators pray that this Court make its Preliminary Writ of Prohibition permanent and prohibit Respondent from dismissing Relators' claim until Relators have the ability to conduct discovery on the issue and present it to Respondent.

Respectfully submitted:

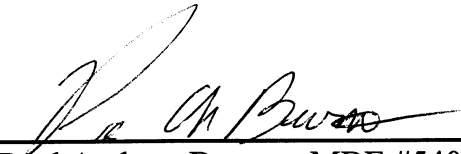


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**CERTIFICATE REQUIRED BY RULE 84.06(c)**

I certify that I signed the original version of this. This Brief complies with the limitations contained in Rule 84.06(b). According to the word count of Microsoft WORD for Mac, the word-processing system used to prepare this Brief, the Brief contains 4,625 words.



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**CERTIFICATE OF SERVICE**

I certify that on March 25, 2016, I signed the original version of the foregoing document, and I electronically filed it with the Clerk of the Court using the Missouri E-Filing system, which sent notice of electronic filing to the following counsel who are or who should be registered with the Court:

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I further certify that on March 25, 2016, I sent a copy of the foregoing document via U. S. Mail to:

The Honorable Kevin D. Harrell  
Circuit Judge, Division 18  
Circuit Court of Jackson County,  
Missouri at Kansas City  
415 East 12<sup>th</sup> Street, 8<sup>th</sup> Floor  
Kansas City, Missouri 64106



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